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Supreme Court, U.S.

FILED

SEP 11 1990

JOSEPH F. SPANIOL, JR.
CLERK

NO: _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

MELVIN W. KRIZAK,
DOROTHY T. KRIZAK
PETITIONERS

V.

UNITED STATES OF AMERICA
RESPONDENT

PETITION FOR A WRIT OF CERITIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI
WITH APPENDIX

MELVIN W. KRIZAK, PRO SE
DOROTHY T. KRIZAK
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QUESTIONS PRESENTED

I

Is it consistent with the principles of fairness and due process of law under the V Amendment, to allow a petitioner - not willing to waive jurisdiction by filing an ANSWER - to suffer a Default Judgment where petitioner has timely appeared and filed a special appearance to timely and specifically challenge jurisdiction until it was ruled upon by the Court, pursuant to the Federal Rules of Civil Procedure, Rule 12 (b) (1) (2) (3), and jurisdiction was never ruled upon by the Court prior to the entry of the Default Judgment?

II

Is it consistent with the principles the fairness and due process of law, under the V Amendment to allow petitioner, to suffer a Default Judgment where petitioner has been denied his demand to appear before a United States District Judge to have jurisdiction established, and when petitioner has never agreed to a written consent pursuant to 28 USC sect. 636 (c), and FRCP Rule 73 (b) to appear before a United States Magistrate?

III

Is it consistent with the principles of fairness and due process of law under the V Amendment to penalize and fine the petitioner for attempting to petition his government for redress of grievances as guaranteed by the I Amendment for his contention to have jurisdiction established before proceeding with the filing of an original ANSWER?

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CONSTITUTIONAL PROVISION

United States Constitution V
Amendment 2

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

=====

NO: _____

MELVIN W. KRIZAK & DOROTHY T. KRIZAK,
PETITIONERS

V.

UNITED STATES OF AMERICA
RESPONDENT

=====

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioners, Melvin W. Krizak
and Dorothy T. Krizak, respectfully prays
that a writ of certiorari issue to review
judgement of the United States Court of
Appeals for the Fifth Circuit entered
June 19, 1990.

OPINION BELOW

THE Court of Appeals entered its'
unpublished decision affirming the de-
nial of the petitioners' appeal dated
May 31, 1990.

(Appendix "A")

The court denied petition for rehearing on June 19, 1990. (A copy of the order is attached as Appendix "B").

JURISDICTION

The final judgement of the Court of Appeals was entered on June 19, 1990. On June 29, 1990, pursuant to FRAP 41 the Appellant Court closed the case.

The jurisdiction of this case is invoked in 28 U.S.C., section 1254 (1) and 2101 (c).

CONSTITUTION PROVISION INVOLVED

United States Constitution V Amendment: Nor shall any person ... be deprived of life, liberty, or property without due process of law ...

STATEMENT OF CASE

This case concerns the Fifth Circuit Court of Appeals refusal to consider and apply Rule 12 (b) (1) (2) (3) of the FRCP, the V Amendment guaranteed to "due process of law" and the I Amendment right "to peti-

tion the government to redress." The result was the sustaining of the United States District Court's unlawful jurisdiction over petitioner's person and subject matter; and penalizing and fining him for simply challenging the court's jurisdiction.

I. PARTIES IN THE UNDERLYING CONTROVERSY

On August 24, 1977, the United States filed a faulty Complaint. The nature of the Complaint was an Action of Debt in the United States District Court in Houston, Texas, alleging petitioner owed a tax debt to the United States, but failing to set forth the law or authority that imposed said debt.

II. PROCEEDINGS IN THE DISTRICT COURT

Petitioner contends that there is no law cited in the complaint that confers lawful jurisdiction over his person and subject matter upon the United States or one of their Courts. Therefore, petition-

ers timely answered by special appearance to challenge jurisdiction, pursuant to FRCP, Rule 12 (b) (1) (2) (3).

"Litigants cannot invest the Court with any jurisdiction or power not conferred on it by law." Copper v. Davis 1931, 231 App. Div. 527 248 N.Y.S. 227, and others.

"When in fact and in law the Court is without power to act, no jurisdiction can be acquired because of the consent of one of the parties - to a submission of litigation of the Court." Vaughan v. Vaughan, 1942, 178 Misc. 577, 35 N.Y.S. 2d 421.

"Under Rule 12, if defense of lack of jurisdiction of person is not raised by motion before ANSWER, or in ANSWER itself, it will be treated as waived, not because of the defendants voluntary appearance but because of his failure to assert defense within time prescribed by these rules. "Orange Theatre Corp. v. Rayherstz Amusement Corp. (1944, CA3, N.J.) 139 F2d, 871 cert. den. 322 U.S. 740, 88 L Ed 1573, 64 S CT 1057.

Thereafter, this case was dismissed without prejudice on Nov. 30, 1987 for lack of prosecution on the part of the United States. (Appendix "C".)

The respondent applied for reinstatement on Dec. 11, 1987 which was granted by

the Court on Dec. 29, 1988. Petitioner again filed a challenge to the Court's jurisdiction with a special appearance pursuant to FRCP, Rule 12 (b) (1) (2) (3), as he had done at the onset of the case. The court denied petitioner's "Demand to Dismiss" pursuant FRCP, Rule 12 (b) (1) (2) (3), without even allowing the petitioner to appear before a United States District Judge to have jurisdiction established before proceeding further. The petitioner never agreed (to a written consent) to appear before a United States Magistrate pursuant to 28 U.S.C. Sect. 636 (c) and FRCP, Rule 73 (b) but was ordered to appear before a United States Magistrate, who refused to allow petitioner to present his case in his challenge to the Court's jurisdiction! (Appendix "D"). This petitioner's right was violated a SECOND time when ORDERED by Magistrate Frances Stacy on May 23, 1990 to appear in court on June 13,

1990 (Appendix "E").

"Consent of the parties cannot confer on a Court jurisdiction of the subject-matter of an action beyond its jurisdiction." Herpe v. Herpe 1915, 89 Misc. 142 151 N.Y.S. 503.

"Jurisdiction means that the judge must have jurisdiction over both the person and the subject-matter if he is to be immune and further, the court must have authority under applicable LAW to enter the order that was entered." (Not in equity). Duba v. McIntyre(1947 CA8Nebr.) 501 F2d 590, Wade v. Bethesda Hospital (1971 D.C. Ohio) 337 F. Supp, 671 Cert Den (D.C. Ohio) 356 F. Supp 380.

Thereafter the respondent filed a request for entry of Default Judgement which was entered by the clerk. In opposition, petitioner filed a "Request Not To Enter Plaintiffs Default Judgement". At the hearing before United States Magistrate Karen Brown, the Court below construed all of the petitioner's "Jurisdictional Challenges" as NO ANSWER and issued a Default Judgement to the United States Government, against petitioner to the property located at 1200 Memorial Drive, Baytown, Harris

County, Texas, (where petitioner resides), without lawful jurisdiction. Following the Default Judgement, the respondent filed for an Amended Default Ruling with supporting documents that were merely heresay in support of the charge in the Court's ruling (Appendix "F").

III. PROCEEDINGS IN THE COURT OF APPEALS

The Court of Appeals has denied petitioner due process of law (by allowing the District Court to proceed without lawful jurisdiction over the petitioner and without having had jurisdiction established before granting respondent a Default Judgement against petitioner for having failed to file an ANSWER) in their dismissal of petitioners appeal dated May 31, 1990.

This Court said, "While we are seldom disposed to dismiss an appeal on purely technical grounds, it is nevertheless our duty to notice jurisdictional defects. Sua sponte, and where, as here, there is no statutory authority upon which to base appellate jurisdiction, no amount of mutual consent can create jurisdiction where none has previously existed." Neirbo

Co. v. Bethlehem Shipbuilding Corpora-
tion 308 US165, 605 Court 534, 95
Led.702; Anastasiadis v. Little John
339 F 2d 538 5th Circuit.

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals was not free to ignore the application of Rule 12 (b) (1) (2) (3) of the Federal Rules of Civil Procedure.

Rule 12 (b) (1) (2) (3) is a practical rule promulgated to achieve an important goal. The goal is to protect petitioner from being harmed by the Government assuming jurisdiction over petitioner's person and subject matter, where no jurisdiction existed. When the petitioner filed a special appearance (not a general appearance), and challenged the Court's jurisdiction, pursuant to FRCP, Rule 12 (b) (1) (2) (3), it was the Court's requirement to establish lawful jurisdiction over the petitioner before granting the Government a Default Judgement for failure to file an

ANSWER. (See Orange Theatre v. Rayherstz Amusement Corp., supra)

II.

FRCP, Rule 12 (b) (1) (2) (3), exists to prevent the Government from denying petitioner his substantial RIGHT TO BE LEFT ALONE where no jurisdiction over the petitioner has been established by the Court.

The rule of the law was announced in Olmstead v. United States 277 U.S. 438 that:

"Decency, security, and liberty alike demand the Government officials shall be subjected to the same rules of conduct that are commands to the citizens. In a Government of law, the existence of the Government will be imperiled if it fails to follow the law scrupulously. Our Government is the potent, omnipresent teacher for good or ill. It teaches the people by example. Crime is contagious. If the Government becomes a law breaker it breed contempt for law. It invites every man to become a law unto himself: It invites anarchy. To declare that the Government has committed crimes in order to secure the conviction of even a private criminal, would bring a terrible retribution. Against this pernicious doctrine, the Court should absolutely set it's face."

III.

Clerk never gave petitioner written notice to consent to exercise by a Magistrate of Civil Jurisdiction over the case as authorized by Title 28, U.S.C. Section 636c, FRCP Rule 73 (b). Petitioner has yet to give written consent.

CONCLUSION

The decision of the lower Court represents a marked departure from established precedent in our historical respect for the individual rights of the people. Clearly, Melvin W. Krizak's right to have jurisdiction established before suffering a Default Judgement that divests him of the home wherein he resides is an absolute denial of his right to due process of law.

The lower Court was empowered to examine this case and correct the jurisdictional defect under the Federal Rules of Civil Procedure, Rule 12 (b) (1) (2) (3) and should have dismissed this case for

lack of lawful jurisdiction in favor of petitioner. As this Court cogently noted in Harmel v. Helvering, 313 U.S. 552, 557 (1941):

"Rules of practice and procedure are devised to promote the ends of justice, not to defeat them. A rigid judicially declared practice, under which Courts review would invariably and under all circumstances decline to consider all questions which had not been previously urged, would be out of harmony with this policy. Orderly rules of procedure do not require sacrifices of the rules of fundamental justice."

Our legal system cannot function without the respect and support of the people. The people can neither respect nor support a system which allows a man to suffer a denial of due process of law because neither the United States District Court nor the Appeals Court considered the application of FRCP, Rule 12 (b) (1) (2) (3), to establish lawful jurisdiction before Default Judgment was granted against petitioner.

For the foregoing reasons, this Court is asked to grant Melvin W. Krizak's peti-

tion and issue a writ of certiorari to the
Court of Appeals.

Respectfully submitted,

Melvin W. Krizak

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1200 Memorial Drive
Baytown, Texas 77520
(713) 427-3389

Respectfully submitted,

Dorothy T. Krizak

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APPENDIX

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Court of Appeals.

Respectfully submitted,

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X2003994

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-6001
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MELVIN M. KRIZAK
DOROTHY T. KRIZAK AND
HACIENDA TRUST COMPANY,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-87-2677)

(May 31, 1990)

Before GEE, DAVIS, and JONES, Circuit
Judges. PER CURIAM:

For nearly ...

The appeal is DISMISSED.

It is further ORDERED that appellants
are to pay \$1,500 to the United States as
sanctions pursuant to FRAP 38.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-6001

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MELVIN M. KRIZAK,
DOROTHY T. KRIZAK and
HACIENDA TRUST COMPANY,

Defendants-Appellants.

Appeal from the United States District
Court for the
Southern District of Texas

ON PETITION FOR REHEARING

(June 19, 1990)

Before GEE, DAVIS AND JONES, Circuit
Judges.

PER CURIAM:

IT IS ORDERED that the petition for

APPENDIX B
CONTINUED

rehearing filed in the above entitled and
numbered cause be and the same is hereby
denied.

ENTERED FOR THE COURT:

Edith H. Jones

United States Circuit Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

U.S.A.	*	
	*	
v.	*	CIVIL ACTION
	*	<u>H-87-2677</u>
MELVIN W.	*	
KRIZAK, ET AL	*	
	*	

ORDER OF DISMISSAL

It has come to the attention of this Court that this action, filed on August 24, 1987, has not been answered within 20 days as required by Federal Rules of civil Procedure 12 (a). The record also reflects that a period well in excess of 60 days has passed from the date an answer was due without action by the plaintiff. The Local Rules of the United States District Court for the Southern district of Texas provide as follows:

"When a defendant has been duly served with summons and in due course fails to answer or otherwise appear, the plaintiff shall move for entry of

APPENDIX C
CONTINUED

an order of default and promptly thereafter, pursuant to Rule 55 (b) Fed. R. Civ. P., make and notice a motion for default judgment, certifying thereon that a copy of such motion was mailed by certified mail, return receipt requested, to the defendant. When a defendant has been in default for a period of 60 days without the plaintiff's having moved for default judgment, the action may be summarily dismissed"

Southern District of Texas Rule 13 (b).

This Court also has inherent powers to manage its own affairs to achieve the orderly and expeditious disposition of cases and to avoid calendar congestion. Link v. Wabash R. R., 370 U.S. 626, 8 L.Ed.2d 734, 82 S.Ct. 1386 (1962).

In accordance with the foregoing principles and authorities, it is

APPENDIX C
CONTINUED

ORDERED, ADJUDGED and DECREED that
this action be DISMISSED without prejudice
for want of prosecution.

DONE at Houston, Texas, this 30th day
of November, 1987.

Gabrielle K. McDonald

UNITED STATES DISTRICT
JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT DOCKET
H-87-2677

Page 2

DATE

09/30/88 ORDER FOR CONF. BEFORE MAGISTRATE
K. K. BROWN, etc.

Page 2

DATE

10/07/88 Defts DEMAND to Take Judicial,
NOTICE Pursuant to F.R.E. Rule
20(d), and DEMAND to Dissolve
this action Pursuant to No Lawful
Jurisdiction Over Melvin W. Krizak,
Dorothy T. Krizak, and Hacienda
Trust, filed. bj M/D 10-31-88 by
clerk - dkt'd 10-07-88

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DISTRICT

UNITED STATES	
Plaintiff	\$
	\$
	\$
	\$
VS.	\$
	\$
MELVIN W. KRIZAK,	\$
AT AL.	\$
Defendants.	\$

CIVIL NO. H-87-2677

ORDER

The defendants in the above titled action have filed a motion "Requesting the Court to Stay Internal Revenue Service's Notice of Intent to Levy."

IT IS ORDERED that the levy by temporarily stayed until a hearing is held upon this Motion.

The parties shall appear for hearing at 10 A.M. on June 13, 1990, Courtroom 703, 7th Floor, 515 Rusk, Houston, Texas, for a hearing on this Motion. The parties shall deliver to chambers a copy of any further pleadings and responses filed in regard to this issue.

APPENDIX E
CONTINUED

The clerk shall file this Order and
provide a true copy to counsel all parties.

SIGNED this 23rd day of May, 1990.

Frances H. Stacy

UNITED STATES MAGISTRATE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff)	
)	CIVIL NO.
)	H-87-2677
MELVIN W. KRIZAK,)	
DOROTHY T. KRIZAK)	
and HACIENDA)	
TRUST CO.,)	
)	
Defendants)	

AMENDED DEFAULT JUDGMENT

The plaintiff, United States of America, has moved this Court to enter judgment by default, in the amount of \$39,232.36, plus interest and statutory additions as allowed by law against Melvin W. Krizak; and \$14,610.80, plus interest and statutory additions as allowed by law against Dorothy T. Krizak, in accordance with 26 U.S.C. Sections 6621, 6601 and 28 U.S.C. Section 1961. Because of Defendants Melvin M. Krizak and Dorothy T. Krizak and Hacienda Trust Company's failure to plead

APPENDIX F
CONTINUED

or otherwise defend in this action, they are in default. Based on this Court's Order of February 10, 1989 and the United States' motion and its attached Declaration and Supporting Memorandum, this court is of the opinion that the said Motion for Default Judgment should be granted. It is, therefore,

ORDERED, ADJUDGED and DECREED that plaintiff, United States of America, have and recover judgment against Defendants Melvin W. Krizak in the amount of \$39,232.36 and against Dorothy T. Krizak in the amount of \$14,610.80 for unpaid income taxes, statutory additions as allowed by law, plus interest as provided for in 26 U.S.C. Sections 6621, and 6601 and in 28 U.S.C. Section 1961.

It is further ORDERED, ADJUDGED and DECREED that the purported transfer of the parcel of real property described as Lot

APPENDIX F
CONTINUED

One Hundred Sixty-three (163) in Graywood, Section Two, a subdivision in the Harvey, Whiting Survey, Harris County, Texas, according to the map or plat thereof of record in Volume 67 at Page 11 of the Maps Records of Harris County, Texas, is void, and that the United States has valid tax liens attaching to said property:

It is further ORDERED, ADJUDGED and DECREED that costs are to be taxed against Defendants Melvin W. Krizak and Dorothy T. Krizak.

DONE this 19th day of September, 1989.

JUDGE M. HARMON

UNITED STATES DISTRICT JUDGE

